Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

JIANGSU SOPO CORPORATION (GROUP) LTD.,
Petitioner,

v.

BP CHEMICALS LTD., an English Corporation,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* (2002), claims against a foreign state (including any agency or government-owned corporation) are outside the subject matter jurisdiction of the courts of the United States, subject to certain specified exceptions. One of these, the "commercial activity" exception, applies where, *inter alia,* the action is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (2002).

The question presented is as follows:

> Under this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), does the commercial activity exception set forth in the first clause of 28 U.S.C. § 1605(a)(2) apply whenever "one element" of the plaintiff's claim is "based upon" a foreign state's commercial activity in the United States, without regard to the significance of that element to the claim (as held by the Eighth and Ninth Circuits), or must the commercial activity within the United States be the "gravamen" of the claim (as held by the Second, Third, and Fifth Circuits)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jiangsu Sopo Corporation (Group) Ltd. ("Sopo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Missouri (App. at 19a-31a) is reported at 144 F. Supp. 2d 1140 (E.D. Mo. 2001). The opinion of the United States Court of Appeals for the Eighth Circuit (App. at 1a-18a) is reported at 285 F.3d 677 (8th Cir. 2002).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 3, 2002. A petition for rehearing was denied on May 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Sopo is a corporation organized under the laws of, and wholly owned by, The People's Republic of China ("China"). (C.A. App. 530.) Respondent BP Chemicals Ltd. ("BP"), is a corporation organized under the laws of the United Kingdom and has its principal place of business in that country. (C.A. App. 380.)

The suit was commenced in February, 1999. (C.A. App. 1.) The principal claim advanced by BP in its Amended Complaint (the "Complaint"), and the only one addressed by the court of appeals, is a claim under the Missouri Uniform Trade Secrets Act ("MUTSA"), Mo. Rev. Stat. § 417.453 (2002). BP's Complaint expressly concedes that Sopo, as a wholly-owned government corporation, is entitled to sovereign immunity and is presumptively exempt from the subject matter jurisdiction of this country's courts under the FSIA. The Complaint avers, on information and belief, that

BP's claims are not barred because they fall within the so-called commercial activity exception of the FSIA. 28 U.S.C. §§ 1605-07.

Sopo moved to dismiss BP's complaint under the FSIA for lack of subject matter jurisdiction. (C.A. App. 459-62.) The district court adopted a "gravamen" test and held Sopo immune from suit under the FSIA (App. at 20a), finding that the essential activities on which BP's claim was based occurred in Asia. BP thus failed to carry its burden of proving that either clause one (*see supra*, p. 4) pertaining to commercial activities in the United States, or clause two pertaining to acts performed in the United States in connection with commercial activity elsewhere, of the commercial activity exception applied (BP did not invoke clause three). (App. at 23a-28a.)

The court of appeals, addressing only clause one, reversed, holding that clause one was applicable. (App. at 9a-13a.) The court of appeals, assuming all facts of BP's Complaint to be true, did not disagree with the district court's view that the gravamen of BP's claim consists of activities that took place outside of the United States, but found clause one applicable, holding that the test was whether "one element" of the cause of action "concern[s]" commercial activity in the United States. (App. At 6a.)

I. RELEVANT BACKGROUND FACTS

Sopo owns and operates an acetic acid plant in Zhenjiang City, Jiangsu Province, China. The plant was built pursuant to a 1992 contract, executed in China, between Sopo and a contractor named Shanghai Petrochemical Engineering Co. ("SPECO"). (C.A. App. 537.) Its entire output of product is sold in Asia, primarily in China itself. (C.A. App. 537.) BP claims that this plant incorporates its trade secrets.

SPECO or its subcontractors subcontracted with various companies for the equipment needed to build the plant. (C.A.

App. 4590-4624.) Some of the contracts were with equipment vendors located in the United States. (*Id.*) All of the contracts were executed outside the United States. (*Id.*)

BP's allegations make it clear that any alleged improper acquisition of the trade secrets took place outside the United States, most likely in Taiwan or China. BP alleges that it "has evidence establishing that the 921 Project acetic acid plant—which uses the basic methanol carbonylation process —was designed (and built) with illegal access to BP Chemicals' proprietary technology." (C.A. App. 390.) BP alleges that the 921 plant was modeled on either of two BP-licensed plants, one in Shanghai, China, and one in Taiwan. The Complaint continues by alleging that, "Given the tight secrecy agreements signed by all participants associated with the[se two] projects—which are still in place today—the Chinese defendants [Sopo and SPECO] could not lawfully have come into possession of this licensed technology. Rather, the Chinese defendants obtained access to BP Chemicals' proprietary acetic acid technology through breach of secrecy agreements prohibiting the use and disclosure of the information in question." (C.A. App. 390.)

II. THE DISTRICT COURT'S DECISION

The district court's analysis was straightforward. Recognizing that BP's liability theories rested on the notion that SPECO at all times was acting as Sopo's agent, Judge Perry noted that she did not believe BP sufficiently alleged agency but, even if BP's theory were accepted, *arguendo*, it would make no difference to the FSIA analysis: "Although I do not believe that BP has shown that SPECO was acting as Sopo's agent, I will assume for purposes of this decision that agency exists and that all of SPECO's activities relating to the 921 plant are attributable to Sopo. I do this because it demonstrates that even if SPECO were Sopo's agent, jurisdiction would still not be proper." (App. at 22a-23a.)

The district court upheld Sopo's immunity, based on the "gravamen" test, finding that BP's complaint clearly was founded upon commercial activities carried out in Asia, and bore an immaterial relationship to this country:

> [I]n this case, Sopo's construction of the 921 plant "occurred primarily" in China. Although SPECO contracted with United States vendors and visited the United States in order to procure equipment for the 921 plant, these procurement activities were a relatively small part of the larger process of building the plant. Moreover, Sopo operates the plant in China and sells the acetic acid produced by the plant exclusively within the Chinese market. Sopo's construction and operation of the 921 plant does not amount to commercial activity "in" the United States.
>
> Although SPECO's vendor contracts themselves likely amount to commercial activity occurring in the United States, this commercial activity cannot serve as the predicate for jurisdiction under the first clause of § 1605(a)(2) because this lawsuit is not "based upon" the contracts. In [*Saudi Arabia v.*] *Nelson*, [507 U.S. 349 (1993)] the Supreme Court explained that the "based upon" terminology requires that the cause of action have a nexus stronger than "a mere connection with, or relation to" commercial activity within the United States. *Nelson*, 507 U.S. at 358, 113 S. Ct. 1471. The Court concluded that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357, 113 S. Ct. 1471. *In other words, a court must focus on the gravamen of the complaint in determining whether the cause of action is "based upon" commercial activity in the United States.*

(App. at 24a-25a (emphasis added).)

Turning to BP's argument that it had limited its claim to one of "illegal disclosure" in the United States, and was not

challenging activities in Asia, the district court obviously saw the circularity in the argument and rejected it, stating:

> Contrary to BP's assertion, Sopo's activities within the United States are not sufficient to establish a cause of action. All that Sopo allegedly did in the United States was disclose BP's trade secrets to the United States vendors. This act if proved would not itself establish a trade secret misappropriation. For BP to prevail on a misappropriation theory, it would also have to show that Sopo acquired the information in an unlawful manner.

(App. at 27a.)

III. THE COURT OF APPEALS' DECISION

Rather than focusing on the "gravamen" of BP's claim (as the district court did), the court of appeals chose to rely on a "one element" test in determining the issue of sovereign immunity. Thus, the court of appeals stated with regard to clause one of the commercial activity exception, "We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States," and "only one claim or element of a claim need concern commercial activity in the United States to erode Sopo's presumptive immunity." (App. at 6a, 7a.) The court of appeals found that BP's allegation that a disclosure had taken place in the United States was sufficient to establish the commercial activity exception. (App. at 9a.) In addition, the court of appeals held that BP's "claim satisfies the required nexus with the United States because the claim is linked to Sopo's procurement activities in the United States." (App. at 10a.)

The court of appeals adopted a "one element" test, and, on that basis, found that BP had sufficiently alleged claims based on commercial activity in the United States. As the court below wrote:

> The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113

> S. Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim. . . . An action is based upon the elements that prove the claim, no more and no less. If one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos* [*v. Compagnie Air France*,] 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). *We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*

(App. at 6a (emphasis added).)

On the basis of its conclusion that the commercial activity exception required that only "one element" of a claim take place in the United States, the court of appeals disregarded the fact that the core elements of BP's claim concerned foreign parties and activities in Asia.

REASONS FOR GRANTING THE PETITION

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE COMMERCIAL ACTIVITY EXCEPTION UNDER *NELSON*

The FSIA provides that "a foreign state is presumptively immune from the jurisdiction of United States courts" and that, "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). The FSIA defines a foreign state to include agencies, instrumentalities, and wholly-owned corporate entities. 28 U.S.C. § 1603(a)(b); *see also* H.R. Rep. No. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

Under the FSIA, the question of immunity is two-fold. First, is the defendant a foreign state? Second, if it is, do the actions complained of fall within one of the exceptions to

immunity defined in the statute? In this case the relevant potential exception is the commercial activity exception of § 1605(a)(2), which provides that the foreign state's immunity is lost when:

> the action is based upon [*clause 1*] a commercial activity carried on in the United States by the foreign state; or [*clause 2*] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [*clause 3*] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

This Court addressed the scope of the commercial activity exception, particularly with regard to clause one, in the *Nelson* case. In *Nelson*, this Court held that the phrase "based upon" in the commercial activity exception "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. The court cited and quoted *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985), for the proposition that the focus should be on the "gravamen" of the complaint. *Id.* The Court also cited and quoted *Santos*, 934 F.2d at 893, for the proposition that "[a]n action is based upon the elements that prove the claim, no more and no less."

II. THE COURT OF APPEALS' APPLICATION OF A "ONE ELEMENT" DEFINITION OF "BASED UPON" IS IN CONFLICT WITH THE "GRAVAMEN" DEFINITION ESTABLISHED IN *NELSON* AND APPLIED BY OTHER CIRCUITS

The court of appeals, in holding that the commercial activity exception to foreign sovereign immunity would apply even if only "one element" of a claim took place in the United States, went far beyond the scope of that exception, as interpreted and applied by this Court in *Nelson*. But this was

not an isolated or random error. The Eighth Circuit is not alone among the circuit courts of appeal in holding, in ostensible reliance on *Nelson*, that a party invoking the commercial activity exception need only show that "one element" of the claim took place in the United States. *See, e.g., Sun v. Taiwan*, 201 F.3d 1105 (9th Cir.), *cert. denied*, 531 U.S. 979 (2000). Other courts of appeal have hewn more closely to the language and holding of *Nelson* and concluded that the "gravamen" of the cause of action must consist of commercial activity in the United States.[1] *See, e.g., Aldy ex rel. Aldy v. Valmet Paper Mach.*, 74 F.3d 72 (5th Cir. 1996); *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 329-30 (2d Cir. 1993); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993). This inconsistency and confusion of standards and results seriously undermine the FSIA's purpose of promoting uniformity in the sensitive area of the United States' treatment of foreign states in its courts.

A. In Construing The Phrase "Based Upon" In The Commercial Activity Exception, The Circuit Courts Of Appeal Have Split On Whether A "One Element" Or "Gravamen" Test Applies

Despite the fact that the *Nelson* decision directly addressed the question of what the phrase "based upon" means in the commercial activity exception, the circuit courts of appeal have taken different approaches in interpreting that requirement. Some, like the Eighth Circuit, have applied a "one element" test; some have applied the "gravamen" test. As the instant case demonstrates, the outcome of the analysis is directly affected by which test is applied.

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[1] Still others suggest that the "based upon" language requires a "substantial nexus" or "identifiable nexus" between the commercial activity and the claim. *See, e.g., Haven v. Polska*, 215 F.3d 727 (7th Cir.), *cert. denied*, 531 U.S. 1014 (2000).

1. *Eighth Circuit—"One Element"*

Notwithstanding this Court's undertaking in *Nelson* to define the scope and application of the commercial activity exception, certain of the courts of appeal, including the Eighth Circuit, have apparently viewed the holding of *Nelson* as so broad or so vague as to allow them essentially to fashion their own standard. In this case, the Eighth Circuit decided to adopt a "one element" test and then purported to locate language in *Nelson* to support that result. As the court below wrote:

> The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113 S. Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim. . . . An action is based upon the elements that prove the claim, no more and no less. If one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos*, 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). *We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*

(App. at 6a (emphasis added).)

The court of appeals below elected not to refer to the "gravamen" language that this Court quoted approvingly from *Callejo*. *Nelson*, 507 U.S. at 357. Instead, the court of appeals, in support of its "one element" test, chose to rest its decision on language from the Seventh Circuit's *Santos* decision that this Court did not refer to or adopt. (App. at 6a.) Contrary to the assertion of the Eighth Circuit, this Court's decision in *Nelson* did not "cite [*Santos*] approvingly on this point." (App. at 6a.) *Nelson* stated as follows:

> the phrase ["based upon"] is read most naturally to mean those elements of a claim that, if proven, would entitle a

> plaintiff to relief under his theory of the case. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (focus should be on the "gravamen of the complaint"); *accord*, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less").

Nelson, 507 U.S. at 357. *Nelson* thus endorsed the Seventh Circuit's *Santos* decision insofar as it held that an "action is based upon *the elements* that prove the claim." *Nelson*, 507 U.S. at 357 (emphasis added). This unexceptional (and pluralized) language fails to support the court of appeals' "one element" test.

2. *Ninth Circuit—"One Element"*

The Eighth Circuit was not the first court of appeal to adopt a single element test following this Court's decision in *Nelson*. In its brief before the Eighth Circuit, BP was able to urge the court to apply a "one element" test, with citations to decisions of the Ninth Circuit. As BP asserted:

> The accepted reading of *Nelson* is that an 'action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States.' *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000), *quoting Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994) (emphasis added).

(BP App. Br. at 36.)

The two post-*Nelson* Ninth Circuit cases cited by BP—*Sun* and *Sugimoto*—do in fact squarely support the "one element" test that the Eighth Circuit adopted in this case. As in this case, the Ninth Circuit resorted to misreadings of *Nelson* to reach that result. In *Sugimoto*, the Ninth Circuit simply asserted, without reference to particular language in *Nelson*, that "an action is based on commercial activity in the United

States if *an element* of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States." *Sugimoto*, 19 F.3d at 1311 (citing *Nelson*, 507 U.S. 355-56) (emphasis added). In *Sun*, the Ninth Circuit found support for its single element test in its prior decision in *Sugimoto*. *Sun*, 201 F.3d at 1109. When the Ninth Circuit turned to the *Nelson* case, it ignored the "gravamen" language, instead referencing this Court's analysis for the unremarkable proposition that "[t]he entire case need not be based on the commercial activity of the defendant." *Id.* at 1109.

3. *Second, Third, and Fifth Circuits—"Gravamen" or "Foundation"*

In contrast, other courts of appeal have applied the "gravamen" test in determining the applicability of the commercial activity exception. *See Drexel Burnham Lambert Group Inc.*, 12 F.3d at 329-30 (applying clause three; "The gravamen of these claims concerns the essentially judicial role of the Committee in marshalling the assets of Galadari . . . and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged."); *Aldy ex rel. Aldy,* 74 F.3d at 75 (applying clause three; because "the gravamen of the plaintiffs' suits are that the paper machine 'was unreasonably dangerous in its construction, make-up composition and design,'" the actions were based on manufacturing defects that were commercial activities of the foreign state elsewhere); *see also Fed. Ins. Co.*, 12 F.3d at 1270 (the commercial activity must form the "basis" or "foundation" for the claim).

III. THE CONFLICT IN APPLICATION OF FOREIGN SOVEREIGN IMMUNITY AMONG THE CIRCUITS IS IN DIRECT OPPOSITION TO CONGRESSIONAL INTENT AND DETRIMENTAL TO CRITICAL POLICY OBJECTIVES

A. The United States Recognized The "One Element"/"Gravamen" Conflict Pre-*Nelson* And Advocated The "Gravamen" Test

The question of whether the phrase "based upon" in the statute means that the commercial activities in the United States must constitute the "gravamen" of the action, as opposed to "one element" of a claim, was squarely presented in *Nelson*. In the Brief of the United States As Amicus Curiae Supporting Petitioners filed in the *Nelson* case ("*Nelson* Amicus Curiae Brief"), the United States argued against a "one element" test and endorsed the "gravamen" analysis. *Nelson* Amicus Curiae Brief, at 15, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (No. 91-522) (contending that "based upon" language requires that a court consider the gist or gravamen of the action and not a single element). As the United States maintained, "In other words, the commercial activity must be the basis for the cause of action and not, for example, simply a link in the chain of events that led to an overseas injury." *Id.* at 10.[2]

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[2] *See Nelson* Amicus Curiae Brief at 15 ("Applied according to its defined meaning, the term 'based upon' requires that the foreign state's commercial activity be the 'basis' for—and not merely related to—the cause of action. *See Webster's Third New International Dictionary* 180-181 (1986) (defining the verb "base"); *accord Random House Dictionary* 172 (1987). The specific language requires that the commercial activity provide the foundation for the plaintiff's action. *See Black's Law Dictionary* 128 (5th ed. 1979). The commercial activity must supply the 'gist' or 'gravamen' of the plaintiff's complaint. *See id.* at 620, 631; *accord Webster's Third New International Dictionary* 959, 992 (1986); *Random House Dictionary* 959, 992 (1986)."); *see also American*

The United States stated that there was no question Congress intended to give "based upon" its natural meaning. The United States urged that, if Congress had intended a 'link' or 'element'—a "conceptually different and far less significant relationship"—to vitiate a foreign sovereign's immunity, it would not have said "based upon." *Id.* at 15-16.

Nelson recognizes the United States' argument as to Congressional intent and thus establishes that only cases where the "gravamen" or the essence of a case is commercial activity in the United States satisfy the "based upon" requirement prescribed by the FSIA.[3]

B. The Conflict Is In Direct Opposition To The FSIA Policy Of Creating Uniformity In The Application Of Foreign Sovereign Immunity

The application of the foreign sovereign immunity doctrine, as codified in the FSIA, is of vital importance to the nation's political and economic interests and policies. The FSIA sets forth the scope of and exceptions to foreign sovereign immunity, representing Congress' best judgment, based on its balancing of the appropriate interests, as to when foreign states should and should not be immune from the jurisdiction of courts in the United States. Congress' enactment of the FSIA was also intended to serve the important goal of ensuring uniformity in the courts' determinations of immunity of foreign sovereigns to suit in the United States. Prior to the enactment of the FSIA, the lack of uniformity in these determinations created ongoing difficulties for the State

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Heritage Dictionary 111 (1981) (definition of "basis": "1. A foundation upon which something rests. 2. The chief ingredient or most stable component of anything; fundamental ingredient"); *accord Compact Oxford English Dictionary* 979 (2d ed. 1996); Compact Oxford English Dictionary 701 (2d ed. 1996) ("gravamen" is "the particular part of an accusation that bears most heavily on the accused").

[3] In light of the previously stated position of the United States in *Nelson*, the Court may wish to invite the views of the Solicitor General.

Department and our nation's foreign policy. H.R. Rep. No. 94-1487, at 6-9; 15 Moore's Federal Practice § 104.03 (2002) ("[The FSIA's] primary goal was to abandon the unpredictable case-by-case approach to foreign sovereign immunity in favor of a system in which decisions were to be made on purely legal grounds under procedures that ensured due process."); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The circuit conflict concerning the appropriate interpretation of "based upon" is precisely the type of inconsistency the FSIA intended to avoid. Such inconsistency has direct implications with regard to comity among foreign states, as recognized by the United States. These concerns demand that foreign states be subject to clear standards to prevent such unpredictability of outcomes and potential for strategic forum shopping.

IV. THE "ONE ELEMENT" TEST IS AN ERRONEOUS INTERPRETATION OF THE FSIA

A. The "One Element" Test Is Contrary To This Court's Opinion In *Nelson*

As noted above, the Court in *Nelson* quoted approvingly the language of a lower court holding that the "based upon" language requires that the activity in the United States constitute the "gravamen" of the claim. *Nelson* also rejected the notion that a "link" to the United States would be sufficient to establish the commercial activity exception. In contrast to the court of appeal's statement that "BP's claim satisfies the required nexus with the United States because the claim is *linked* to Sopo's procurement activities in the United States" (App. at 10a (emphasis added)), in *Nelson* this Court held:

> Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with"

> such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.

507 U.S. at 358. In order to invoke the commercial activity exception, a plaintiff must show that the "gravamen" of his cause of action consists of commercial activities in the United States. The Court's analysis in *Nelson* demonstrates an intention not to cause a foreign state to lose its sovereign immunity simply because the plaintiff can show some technical or formal "hook" tying the commercial activities in the United States to his cause of action. Instead, foreign sovereigns will be subjected to jurisdiction when those activities form the "gravamen" of the action. *Nelson*, 507 U.S. at 357-358.

B. The "One Element Test" Is Vulnerable To Manipulative Pleading In Order To Avoid A Finding That A Foreign State Is Immune

The "one element" test is particularly pernicious as it leads to the possibility of artful pleading. Under the "one element" test, claims need only be crafted to aver that an element of any claim occurred in the United States, irrespective of the cause of action at issue and the significance of the element to the claim, in order to vitiate a foreign sovereign's presumptive immunity. Such claim manipulation is flatly inconsistent with this Court's admonishment in *Nelson* that sovereign immunity should not be pierced by semantic ploys of pleading. *Nelson*, 507 U.S. at 363 (holding that a plaintiff's attempt to recast its claim so as to achieve jurisdiction is a "semantic ploy" that should not be countenanced. The Court further held that "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose.") *Id.*

The vulnerability of the "one element" standard to claim manipulation thus risks exacerbating the lack of uniformity among courts in the application and adjudication of sovereign immunity under the FSIA. A "one element" standard would

encourage the protraction of litigation against foreign states, in direct contravention of the FSIA policy of adjudicating sovereign immunity at the outset to minimize the burden and expense imposed on foreign sovereigns brought into court in the United States. *Verlinden B.V.*, 461 U.S. at 493.

V. THIS CASE IS A GOOD VEHICLE FOR THE COURT TO CLARIFY ITS DIRECTION ON THE "GRAVAMEN" TEST FOR THE COMMERCIAL ACTIVITY EXCEPTION

This case presents a textbook example of the difference between applying a "gravamen" test in the definition of "based upon" and applying a "one element" test. The district court applied the former, and concluded that the commercial activity exception did not apply; the court of appeals applied the latter and concluded that it did. Some commercial activity in this case was in fact connected to the United States, but the district court concluded that it was not particularly important to BP's basic claim. It was not the gravamen of the claim—or, "the particular part of an accusation that bears most heavily on the accused." Compact Oxford English Dictionary 674, 701 (1996). The court of appeals, on the other hand, did not dispute the district court's conclusion that the activities in the United States did not constitute the "gravamen" of the claim but determined that the alleged disclosure in the United States was technically an element of BP's claim and that was sufficient for purposes of the commercial activity exception.

The district court, following *Nelson,* focused on the "gravamen" of BP's claim, or what BP's basic grievance was:

> The Court [in *Nelson*] concluded that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." [*Nelson*, 507 U.S. at 357.] In other words,

> a court must focus on the gravamen of the complaint in determining whether the cause of action is "based upon" commercial activity in the United States.

(App. at 24a-25a.)

The "gravamen" of an action is not synonymous with *any* "element" of an action, but is "the substantial point or essence of a claim, grievance, or complaint." Black's Law Dictionary at 708 (7th ed. 1999). That is what the district court looked to:

> Similarly, in this case, although SPECO engaged in procurement activity in the United States which led to the conduct that eventually injured BP, this activity in the United States is 'not the basis' of BP's suit. At its core, this lawsuit concerns Sopo's acquisition of BP's technology in an unknown place[4] and Sopo's commercial exploitation of that technology in China.

(App. at 25a.)

Here, even if one considers only the allegations of BP's complaint, the action's "substantial point or essence" is that, based on events in Asia, Sopo stole or otherwise came under a duty of non-disclosure with respect to alleged BP trade secrets, and is now using them to produce and sell acetic acid in China. The allegation that Sopo stole or otherwise came under a duty of non-disclosure is the condition precedent to any claim of "illegal disclosure" in the United States. As the district court pointed out, "[f]or BP to prevail on a misappropriation theory [of illegal disclosure], it would also have to show that Sopo acquired the information in an unlawful manner." (App. at 27a.) Likewise, it is the alleged *use* of the trade secrets in China that is what BP claims is causing it

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[4] "An unknown place," but most likely China or Taiwan, as the district court noted: "In this case, there is no evidence, circumstantial or otherwise, that Sopo acquired BP's technology within the United States. As previously noted, all evidence suggests that Sopo acquired the information from a Chinese or a Taiwanese source." (App. at 28a.)

harm, not the disclosure *per se* in the United States. Indeed, BP would have *exactly* the same grievance if none of Sopo, SPECO, or its subcontractors ever did a thing in the United States.

BP's repeated insistence that its claim is not for illegal acquisition of the trade secrets but instead for illegal "disclosure" amounts to nothing more than an attempt to make words camouflage reality. The court of appeals stated, "BP might have chosen to pursue theft-type claims against Sopo, but BP elected *not to do so* and that strategic, legal choice is well within BP's discretion as the master of its complaint." (App. at 9a (emphasis added).) That statement, however, ignores what BP explicitly conceded in its argument to the court of appeals—that it "chose" not to assert a claim for unlawful acquisition because "[I]f we [BP] were in fact suing to shut down SOPO's [allegedly] infringing Chinese plant, or for market damages in China, *then U.S. procurement activities might well be characterized as incidental to those claims*." (BP App. Br. at 9 (emphasis added).) BP cannot eradicate the fundamental fact that any claim it asserts for illegal disclosure in the United States is "based upon" a duty of non-disclosure that arose, if ever, in Asia.

* * * *

In the wake of the Court's decision in *Nelson*, the courts of appeal have struggled and divided over the "based upon" standard under the commercial activity exception, creating marked inconsistency in application of foreign sovereign immunity among the circuits. In light of this climate of confusion and the critical importance of consistency to FSIA policy objectives, this case offers this Court the opportunity to resolve this pressing question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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